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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 710

KOHLMEYER, NEWBURGER & COMPANY, WOODFIN & COMPANY, COHEN, WACHSMAN AND WASSALL, ALBERT MERIC & COMPANY, AMERICAN COTTON COOPERATIVE ASSOCIATION, ET AL., AND BEER AND COMPANY

vs.

COLLECTOR OF REVENUE.

STATEMENT OF BASIS ON WHICH APPELLANTS CONTEND THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE JUDGMENT APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE No. 12.

Pursuant to Supreme Court Rule 12, par. I, American Cotton Cooperative Association, Anderson Clayton & Company, Atkinson & Company, J. S. Bache & Company, Beer & Company, James E. Bennett & Company, Bouden Clay & Company, Cohen, Wachsmann & Wassall, Fenner & Beane, Leslie J. Healey & Company, Hobson & Legendre, Carleton King & Company, McFadden & West, E. A. Pierce

Co., and Merrill Lynch, E. A. Pierce and Cassatt, W. E. Richmond & Company, Stewart Brothers, Tullis Craig & Company, Wells & Stanton, J. J. Williamson & Company, Woodfin & Company, Albert Meric & Company, and Kohlmeyer, Newburger & Company, the above appellants, file this, their statement showing the basis on which said appellants contend that the Supreme Court has appellate jurisdiction to review on appeal the judgment appealed from herein as follows:

I. The statute believed to sustain appellate jurisdiction is Section 344 (a) of Title 28 of the United States Code; Judicial Code, Section 237, which provides that:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal. The appeal shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the appeal".

II. In the Supreme Court of Louisiana there was drawn in question the validity of a statute of the State of Louisiana (Act 24 of 1934 of the General Assembly of the State of Louisiana, as amended by Act 11 of the Second Extraordinary Session of 1935), on the ground that said statute as amended is repugnant to the Constitution of the United States as being violative of the Commerce Clause (Article I, Section VIII) of the Constitution of the United States,

and the decision of the Supreme Court of Louisiana was in favor of the validity of said statute as amended. (See Acts of Louisiana, Sessions of 1934 and 1935, pages 180 and 548 respectively).

The relevant part of the act reads as follows:

> "*Section 1.* Be it enacted by the Legislature of Louisiana, That upon each sale of any cotton for future delivery made at, on or in any exchange, board of trade, or similar institution or place of business, every person, firm, association or corporation, domestic or foreign, selling cotton shall, in addition to all other taxes and licenses levied and assessed in this State, pay a license tax, for the privilege of engaging in such business in this State, of two cents (2¢) for each One Hundred ($100.00) Dollars involved in the price of such cotton so sold, which price shall be computed, at the rate per pound, on the actual weight of the cotton so sold, or, if the sale is effected without giving the weight, or where the weight is unknown, or where the contract of sale specified, in bales, the quantity of cotton transferred, but does not give the weight thereof, then each bale involved in the sale shall be deemed to weigh Five Hundred Pounds (500 lbs.) for the purpose of computing the total price of sale, to be used in ascertaining the amount of the license tax, at two cents (2¢) for each One Hundred Dollars ($100.00) of sale price.
>
> "*Section 2.* It is the intention of this Act to levy, in addition to other taxes and licenses levied in this State, a license tax on every person, firm, association or corporation engaged in the business described in Section I, for the privilege of engaging in such business carried on in this State."

The validity of the Act was attacked as being repugnant to the Commerce Clause (Article I, Section VIII) of the Constitution of the United States for the following reasons:

(a) That the tax is a direct burden on interstate commerce in cotton in that it is levied and exacted on those

buying and selling cotton actually moving in interstate commerce.

(b) That the cotton futures contracts which are taxed are, by the uncontradicted evidence, instrumentalities of interstate commerce, aiding in the free flow of commerce and the tax so levied on these instrumentalities of commerce is a direct interference with and detrimental to the free flow of interstate commerce in cotton. These suits were instituted in a state court of Louisiana and were consolidated and tried and upon the law and the evidence the court found the tax to be a direct burden on interstate commerce, and also a tax upon needed instrumentalities of interstate commerce in cotton, and held the tax unconstitutional.

Appeals were taken by the Collector of Revenue to the Supreme Court of Louisiana and the appeals were consolidated and all the appeals were decided by a single opinion and judgment as shown by the decision of the Supreme Court of Louisiana.

The Supreme Court of Louisiana decided in favor of the validity of the tax without referring to the fact that there was undisputed evidence in the record, not contradicted by a single word, that a part of the cotton covered by these contracts actually moved in interstate commerce, and so violative of the Constitution of the United States. (See *Dahnke-Walker Company* v. *Bondurant*, 257 U. S. 282; *Cooney* v. *Mountain States Telephone & Telegraph Company*, 294 U. S. 384; *Adams Manufacturing Company* v. *Storen*, 304 U. S. 307; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434.)

The Chief Justice of the Supreme Court of Louisiana held that insofar as the tax affected cotton actually moving in interstate commerce, it was invalid, but the court, in its opinion, made no distinction between cotton which actually moved in interstate commerce by virtue of these contracts,

and cotton which did not move, and upheld the validity of the tax indiscriminately as to cotton actually moving and cotton not moving in interstate commerce.

The jurisdiction of the Supreme Court of the United States is invoked upon the theory that the statute has erroneously been held valid for the reason, among others, that it wholly and absolutely disregarded the evidence, undisputed and uncontradicted, that the tax was exacted on contracts for cotton actually moving in interstate commerce and impliedly held the statute to be valid regardless of whether or not the cotton covered by the contracts actually moved. An examination of the record will disclose beyond the suggestion of a doubt, testimony leading to the legal conclusion that interstate commerce was taxed by these statutes, and notwithstanding it taxed these contracts under the statute, the statute was held to be valid.

The jurisdiction of this Court is invoked upon the ground that instrumentalities of interstate commerce are taxed. The jurisdiction of this Court is invoked because the undisputed and uncontradicted evidence proves incontrovertibly that these contracts are instrumentalities of interstate commerce and without which interstate commerce in cotton could not be carried on. The undisputed evidence is that they are just as necessary to interstate commerce in cotton as the telephone, the telegraph, transportation systems and other facilities required and needed for carrying on interstate commerce in cotton.

The trial court which heard the evidence and passed upon the facts, held the statute invalid and the Supreme Court of Louisiana refused to consider the question of the indiscriminate application of the tax to intrastate and interstate commerce, and in effect held that even those contracts regarding cotton which actually moved in interstate commerce was subject to the tax. The Supreme Court of Louisiana erroneously refused to consider the undisputed evidence

that these contracts are a part of interstate commerce and are needed instrumentalities, and erroneously upheld the validity of the statute by denying to the appellants the right to a hearing and consideration of the constitutional questions raised.

III. The judgment appealed from was entered on the 8th day of November, 1943, as appears from Page 172 of the printed record herein.

IV. The application for an appeal was presented on the day of Jan. 27 1944, as appears from Page 184 of the printed record herein.

V. The appeal herein is from a judgment of the Supreme Court of Louisiana in a case at law to recover taxes exacted by the State of Louisiana under Act 24 of 1934 as amended by Act 11 of the Second Extraordinary Session of 1935, for the confection of futures contracts imposed indiscriminately on contracts for the future delivery of cotton which is not the subject of interstate commerce and on cotton which actually moves in interstate commerce, and on all of these contracts which are instrumentalities of interstate commerce, to review a judgment of the Supreme Court of Louisiana reversing a judgment of the 19th Judicial District Court, in and for the Parish of East Baton Rouge, which judgment held the act unconstitutional as imposing a direct burden on interstate commerce in cotton and as imposing a tax on a needed instrumentality of interstate commerce. The pages of the printed transcript cannot be given at present.

New Orleans, Louisiana, January 27, 1944.

Respectfully submitted,

(Signed) ARTHUR A. MORENO,
Counsel for Appellant.

APPENDIX "A".

SUPREME COURT OF LOUISIANA.

Monday, Nov. 8, 1943.

No. 37,171: Kohlmeyer Newburger & Company v. W. A. Cooper, Collector of Revenue.

No. 37,172: Woodfin and Company v. W. A. Cooper, Collector of Revenue.

No. 37,173: Cohen, Wachsman and Wassall v. W. A. Cooper, Collector of Revenue.

No. 37,174: Albert Meric and Company v. W. A. Cooper, Collector of Revenue.

No. 37,175: American Cotton Cooperative Association, Et Al., v. W. A. Cooper, Collector of Revenue.

No. 37,176: Beer & Company v. Rufus W. Fontenot, Collector of Revenue (Consolidated).

On Appeal from the Nineteenth Judicial District Court for the Parish of East Baton Rouge. State of Louisiana. Honorable Charles A. Holcombe, Judge.

PONDER, *Justice:*

In these consolidated cases the plaintiffs are seeking to recover from the Collector of Revenue taxes paid by them in pursuance to Act 24 of 1934, as amended by Act 11 of the 2nd. E. S. of 1935, over their protest. Upon trial, the lower court held the statute unconstitutional and gave judgment ordering the return of the taxes to the plaintiffs. The Collector of Revenue has appealed from this judgment.

The present suits were filed in accordance with the provisions of Act 16 of 1934 (2nd. E. S.) as amended by Act 23 of 1935 (2nd. E. S.) and Act 330 of 1938, Dart's Stats. 8444.2, authorizing aggrieved persons the right to sue for any taxes paid by them under protest.

The plaintiffs contend that the taxes were collected under an unconstitutional statute. The basis of their attack on

the constitutionality of the statute is stated in their brief as follows:

> (1) "That the tax is a direct burden on interstate commerce in cotton.
>
> "Plaintiff further contends, conceding the power of the State of Louisiana to tax those contracts which do not result in the delivery of cotton moving in interstate commerce, the statute is unconstitutional as the tax is imposed indiscriminately on all contracts for the sale of cotton regardless of whether or not such cotton moves in interstate commerce.
>
> (2) "That even if the tax is not a direct burden upon the cotton moving in interstate commerce, yet these contracts are instrumentalities of interstate commerce and so cannot be taxed because such a tax is an unconstitutional interference with interstate commerce."

All of the plaintiffs are partnerships with their domiciles in the City of New Orleans except the American Cotton Cooperative Association, a corporation organized under the laws of the State of Delaware, having its regular office and principal place of business in the City of New Orleans. The plaintiffs are members of the New Orleans Cotton Exchange and are engaged in buying and selling cotton by contracts on the New Orleans Cotton Exchange for future delivery.

The cotton contracts for future delivery in dispute were executed and entered into at the New Orleans Cotton Exchange with the provision that the cotton, represented by a warehouse receipt, is to be delivered at some specific future date at New Orleans, Louisiana, Galveston, Texas or Houston, Texas at the option of the seller.

The statute under attack, Act 24 of 1934, as amended by Act 11 of the 2nd. E. S. of 1935, provides in sections 1 and 2 as follows:

> Section 1. "Be it enacted by the Legislature of Louisiana, That upon each sale of any cotton for future delivery made at, on or in any exchange, board of trade, or similar institution or place of business, every person,

firm, association or corporation, domestic or foreign, selling cotton shall, in addition to all other taxes and licenses levied and assessed in this State, pay a license tax, for the privilege of engaging in such business in this State, of two cents (2¢), for each One Hundred ($100.00) Dollars involved in the price of such cotton so sold, and for each additional One Hundred ($100.00) Dollars or fractional part thereof in excess of One Hundred ($100.00) Dollars, two cents (2¢), which price shall be computed, at the rate per pound, on the actual weight of the cotton so sold, or if the sale is effected without giving the weight, or where the weight is unknown, or where the contract of sale specified, in bales, the quantity of cotton transferred, but does not give the weight thereof, then each bale involved in the sale shall be deemed to weigh Five Hundred Pounds (500 lbs.) for the purpose of computing the total price of sale, to be used in ascertaining the amount of the license tax, at two cents (2¢) for each One Hundred Dollars ($100.00) of sale price, and for each additional One Hundred ($100.00) Dollars or fractional part thereof in excess of One Hundred Dollars, two cents (2¢).

Section 2. "It is the intention of this Act to levy, in addition to other taxes and licenses levied in this State, a license tax on every person, firm, association or corporation engaged in the business described in Section 1, for the privilege of engaging in such business carried on in this State."

The statute in controversy was repealed by Act 35 of 1940. However, the repealing act provides that licenses or taxes due under the provisions of Act 24 of 1934, as amended, are not waived and that the Collector of Revenue shall collect such licenses or taxes in the manner provided in Act 24 of 1934, as amended.

There is no dispute that the licenses or taxes accrued and were paid prior to the effective date of the repealing statute.

The record contains expert testimony as to the effect that contracts of this nature will have on interstate commerce. The testimony, although it might be somewhat persuasive,

is not controlling. The plaintiffs also take the position that Congress and the courts regard contracts of this nature as contracts in interstate commerce and subject to the power of federal taxation.

The statute in dispute levies no tax on the New Orleans Cotton Exchange. The New Orleans Cotton Exchange is not a party to this suit and is a corporation entirely separate and distinct from the partnerships or corporation of the plaintiffs involved herein. The plaintiffs are connected with the New Orleans Cotton Exchange only insofar as they are members and engaged in buying and selling such contracts on the floor of the Exchange. Consequently, the Federal Commodity Exchange Act and the case of Board of Trade v. Olsen, 262 U. S. 1, 67 L. ed. 839, are not pertinent.

The sole question presented in this controversy is whether or not the State has the power to levy the tax on the contracts involved.

There is no question that the State does not have the power to impose a tax on an instrumentality of interstate commerce. Where intrastate transactions are so related to interstate transactions that the government of one involves the control of the other, the State would have no authority to tax such transactions. Meyer *v.* Wells, Fargo & Co., 223 U. S. 298, 56 L. ed. 445; Houston, E. & W. T. R. Co. *v.* U. S., 234 U. S 342, 58 L. ed. 1341; Cooney *v.* Mountain States Telephone & Telegraph Co., 299 U. S. 384, 55 S. Ct. 477, 79 L. ed. 934.

However, transactions purely local are subject to state taxation. Eastern Air Transport, Inc. *v.* South Carolina Tax Commission, 285 U. S. 147, 52 S. Ct. 340, 76 L. ed. 673; Edelman *v.* Boeing Air Transport, 289 U. S. 249, 53 S. Ct. 591, 77 L. ed. 1155; Chassaniol *v.* City of Greenwood, 291 U. S. 584, 78 L. ed. 1004; Coverdale *v.* Ark.-La. P. L. Co., 303 U. S. 604, 58 S. Ct. 736, 82 L. ed. 1043; Parker *v.* Brown, 317 U. S. 352, 87 L. ed. 242, 63 S. Ct. 314.

We realize that Congress has the power to regulate interstate commerce and transactions, enterprises and industries which affect such commerce. NLRB *v.* Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893; NLRB *v.* Fruehauf Trailer Co., 301 U. S. 49, 57 S. Ct. 642, 81 L. ed. 918; Consolidated Edison Co. of N. Y., Inc. *v.* NLRB, 305

U. S. 197, 59 S. Ct. 206, 83 L. ed. 127; United States v. Darby Lumber Co., 312 U. S. 100, 61 S. Ct. 451, 85 L. ed. 609. However, we are not presented in this case with a question of regulation.

In line with the decisions of the Supreme Court of the United States, it appears to us that transactions between the members of an exchange of the nature involved here are purely local in their character. The contracts do not call for any interstate movement. If any interstate shipments are made, they are not because of the contractual obligation but by a chance happening which, in our opinion, could not have the effect of converting these local agreements into subjects of interstate commerce.

The Supreme Court of the United States in the case of Coverdale *v.* Arkansas-Louisiana P. L. Co., 303 U. S. 604, 58 S. Ct. 736, 82 L. ed. 1043, stated:

"Privileges closely connected with the commerce may be regarded as distinct for purposes of taxation. So, local privilege taxes on storage in transit, compressing or dealing in cotton, already moving in its interstate journey from plantation to mill, are validated as imposed upon operations in connection with a commodity withdrawn from the transportation movement. Federal Compress & Warehouse Co. *v.* McLean, 291 U. S. 17, 21, 78 L. ed. 622, 626, 54 S. Ct. 267; Chassaniol *v.* Greenwood, 291 U. S. 584, 78 L. ed. 1004, 54 S. Ct. 541; cf. Minnesota *v.* Blasius, 290 U. S. 1, 78 L. ed. 131, 54 S. Ct. 34. And similar taxes are upheld for the privilege of mining ores or producing gas, notwithstanding the 'practical continuity' of the taxed productive operation and the interstate movement. Oliver Iron Min. Co. *v.* Lord, 262 U. S. 172, 67 L. ed. 929, 43 S. Ct. 526; Hope Natural Gas Co. *v.* Hall, 274 U. S. 284, 71 L. ed. 1049, 47 S. Ct. 639.

"To determine whether this challenged state tax enactment is invalid as an interverence with interstate commerce under the decisions of this Court, the connection of the privilege taxed with interstate commerce has been considered. Other factors also show that the tax here does not interfere with interstate commerce. The tax is without discrimination in form or application as between inter—and intra—state commerce and it cannot be imposed by more

than one state. The course of interstate commerce is clogged by taxes designed or applied so as to hamper its free flow. Section 3, however, bearing equally on all use, is only complementary to the taxes of sections one and two. Henneford *v.* Silas Mason Co., 300 U. S. 577, 584, 81 L. ed. 814, 819, 57 S. Ct. 524. It bears generally on all use of power and is not discriminatory. It obviously adds to the cost of the interstate commerce. But increased cost alone is not sufficient to invalidate the tax as an interference with that commerce. Western Live Stock *v.* Bureau of Revenue, 303 U. S. at 254, ante, 826, 58 S. Ct. 546, 115 A. L. R. 944, supra."

In the case of Eastern Air Transport, Inc. *v.* South Carolina Tax Commission, 285 U. S. 147, 52 S. Ct. 340, 76 L. ed. 673, the plaintiffs sought to enjoin the collection of a gasoline tax on the ground that the gasoline was to be used in planes engaged in interstate commerce. The court held that a tax upon local sales in such cases has never been regarded as imposing a direct burden on interstate commerce and has no greater nor different effect upon it than a general property tax. Also see, Edelman *v.* Boeing Air Transport, supra.

A local privilege tax on money and exchange brokers engaged in buying and selling foreign bills of exchange was upheld in the case of Nathan *v.* The State of Louisiana, 8 Howard 73, 12 L. ed. 992.

In the case of Parker *v.* Brown 317 U. S. 352, 87 L. ed. 242, 63 S. Ct. 314, the Supreme Court of the United States in upholding the raisin marketing program adopted under the California Prorate Act had this to say:

"This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken. Minnesota Rate Cases (Simpson *v.* Shepard), 230 U. S. 352, 399, 400, 33 S. Ct. 729, 739, 740, 57 L. Ed. 1511, 48 L. R. A. N. S., 1151, Ann. Cas. 1916 A. 18; South Carolina State Highway Dept. *v.* Barnwell Bros., 303 U. S. 177, 187 et seq; 625; 58 S. Ct. 510, 514 et seq., 82

L. Ed. 734; People of State of California *v.* Thompson 313 U. S. 109, 113, 114, 61 S. Ct. 930, 932, 933, 85 L. Ed. 1219, and cases cited; Duckworth *v.* Arkansas, 314 U. S. 390, 62 S. Ct. 311, 86 L. Ed. 294, 138 A. L. R. 1144. A fortiori there are many subjects and transactions of local concern not themselves interstate commerce or a part of its operations which are within the regulatory and taxing power of the states, so long as state action serves local ends and does not discriminate against the commerce, even though the exercise of those powers may materially affect it.

"A state is also free to license and tax intrastate buying where the purchaser expects in the usual course of business to resell in interstate commerce. Chassaniol *v.* Greenwood, 291 U. S. 584, 54 S. Ct. 541, 78 L. Ed. 1004. And no case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer, after processing and packing them, will, in the normal course of business, sell and ship them in interstate commerce.

"All of these cases proceed on the ground that the taxation or regulation involved, however drastically it may affect interstate commerce, is nevertheless not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs."

The question raised in these consolidated cases has been passed on in the cases of Ware & Leland *v.* State of Alabama, 209 U. S. 405, 52 L. ed. 855, 28 S. Ct. 526, and Moore *v.* New York Cotton Exchange, 270 U. S. 593, 46 S. Ct. 367, 70 L. ed. 750, and the contracts were held to be local transactions subject to state taxation. The plaintiffs contend that the discussion of these contracts in these two cases is mere obiter dictum. We cannot agree with this position for the reason that the contracts were directly involved and passed on. We quote from the pertinent part of the opinions handed down in these cases.

It is stated in the case of Ware & Leland *v.* State of Alabama, supra:

"But how stands the present case upon the facts stipulated. The plaintiffs in error are brokers who take orders

and transmit them to other states for the purchase and sale of grain or cotton upon speculation. They are, in no just sense, common carriers of messages, as are the telegraph companies. For that part of the transactions, merely speculative and followed by no actual delivery, it cannot be fairly contended that such contracts are the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery as result in actual delivery of the grain or cotton, the stipulated facts show that, when the orders transmitted are received in the foreign state, the property is bought in that state and there held for the purchaser. The transaction was thus closed by a contract completed and executed in the foreign state, although the orders were received from another state. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. * * *

"These contracts are not, therefore, the subjects of interstate commerce any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company. The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

It is also stated in the case of Moore *v.* New York Cotton Exchange, supra:

"* * * The New York Exchange is engaged in a local business. Transactions between its members are purely local in their inception and in their execution. They consist of agreements made on the spot for the purchase and sale of cotton for future delivery, with a provision that such cotton must be represented by a warehouse receipt issued by a licensed warehouse in the Port of New York and be deliverable from such warehouse. Such agreements do not

provide for, nor does it appear that they contemplate, the shipment of cotton from one state to another. If interstate shipments are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce. Ware & Leland Co. *v.* Mobile County, 28 S. Ct. 526, 209 U. S. 405, 412, 413, 52 L. Ed. 855, 14 Ann. Cas. 1031. The most that can be said is that the agreements are likely to give rise to interstate shipments. This is not enough. Engel *v.* O'Malley, 31 S. Ct. 190, 219 U. S. 128, 139, 55 L. Ed. 128. See also Hopkins *v.* United States, 19 S. Ct. 40, 171 U. S. 578, 588, 590, 43 L. Ed. 290; Anderson *v.* United States, 19 S. Ct. 50, 171 U. S. 604, 615, 616, 43 L. Ed. 300, 305, 306, 19 Sup. Ct. Rep. 50."

We are of the opinion that the pronouncements in the cases of Ware & Leland *v.* State of Alabama, supra, and Moore *v.* New York Cotton Exchange, supra, are controlling of the issues herein.

For the reasons assigned, the judgment of the lower court is reversed and set aside; all of the plaintiffs' suits are dismissed at their cost.

* * * * * * *

O'Niell, C. J., is of the opinion that, inasmuch as the license tax levied by Act 24 of 1934, as amended by Act 11 of the 2nd Extra Session of 1935, is levied or computed separately on each transaction, the tax does not violate the commerce clause except in cases where it is levied or computed upon an interstate transaction.

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IN THE

Supreme Court of the United States

October Term, 1943.

No. 710

KOHLMEYER, NEWBURGER & COMPANY, WOODFIN & COMPANY, COHEN, WACHSMAN AND WASSALL, ET AL.,

Appellants,

versus

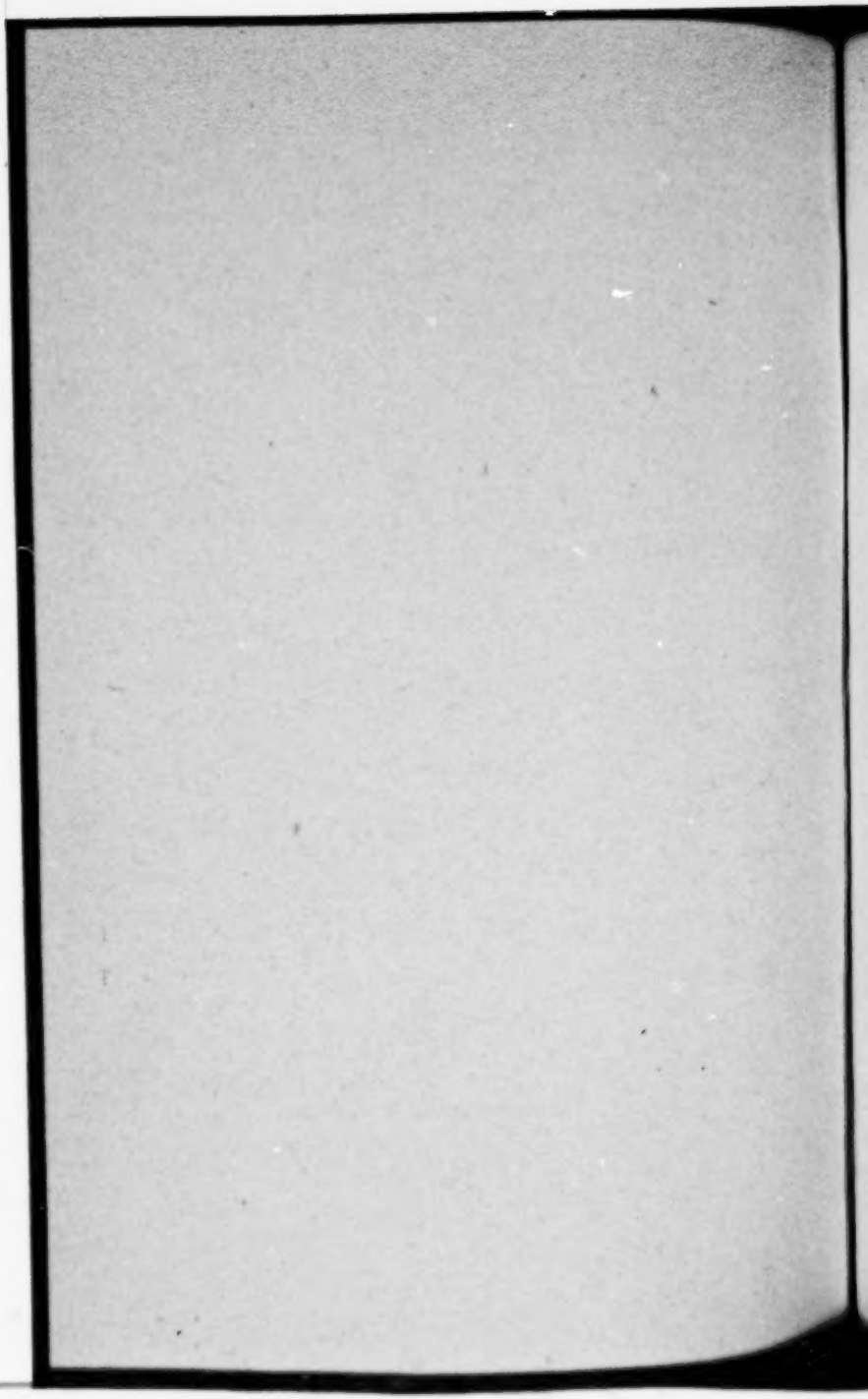
W. A. COOPER, COLLECTOR OF REVENUE,

Respondent.

Appeal from the Supreme Court of the State of Louisiana.

BRIEF IN SUPPORT OF JURISDICTION.

ARTHUR A. MORENO,
Counsel for Appellants.



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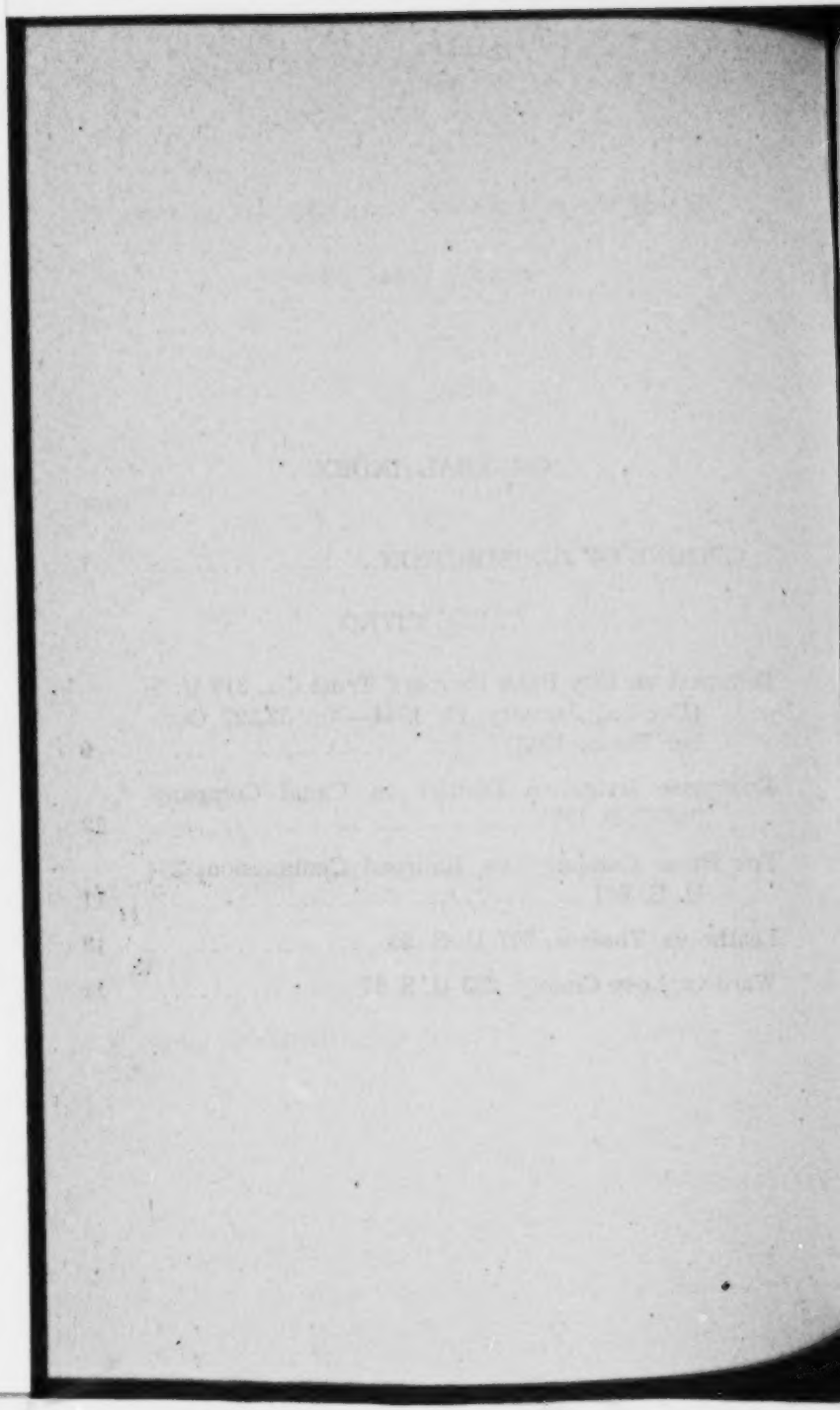

SUPREME COURT OF THE UNITED STATES

October Term, 1943.

No. 710.

KOHLMEYER, NEWBURGER & COMPANY, WOODFIN & COMPANY, COHEN, WACHSMAN AND WASSALL, ET AL.,

Appellants,

versus

W. A. COOPER, COLLECTOR OF REVENUE,

Respondent.

Appeal from the Supreme Court of the State of Louisiana.

BRIEF IN SUPPORT OF JURISDICTION.

MAY IT PLEASE THE COURT:

This brief is written in support of the right of the appellants to review by this Court. The jurisdictional statement sets out fully the grounds upon which the appel-

lants rely, but, because of a statement in the opinion of the Supreme Court of Louisiana regarding the nature of the evidence, we have deemed it important to write this brief. The importance lies in the fact that the statement of the Supreme Court on the question of evidence absolutely and wholly ignores the inevitable conclusion from the evidence. The evidence in support of the appellants' contention is absolutely undisputed. Reasonable men cannot differ as to the conclusion, so that in legal intendment it might unjustly deprive these appellants of the right of appeal if the matter should go unnoticed. We, therefore, are writing this brief, calling to the attention of the court as forcefully as possible the fact that there is no justification in the decision of the Supreme Court for the statement that the evidence might be persuasive but not controlling. We submit that upon an examination of the record, the conclusion must be controlling since no other conclusion can be justly reached.

The pleadings in this case show that in the trial court, the constitutionality of Act 24 of 1934, of the General Assembly of Louisiana, as amended, was under attack as being violative of the Commerce Clause of Article 1, Section 8 of the Constitution of the United States. The record shows that the trial court held the act to be unconstitutional as violative of the Federal Constitution. The decision of the Supreme Court of Louisiana shows that it decided the constitutional question and held that the State of Louisiana was without power to tax an instrumentality of interstate commerce. The decision of the Supreme Court, however, shows while it recognizes the appellants are entitled to constitutional protection it denied that protec-

tion. It denied the appellants the protection guaranteed by the Federal Constitution by saying the evidence that these futures contracts were instrumentalities of interstate commerce was persuasive but not controlling. This was an absolute disregard of undisputed evidence.

We recognize, in the beginning, that if the judgment of the Supreme Court of Louisiana were based upon a fair consideration of the evidence and there was conflicting evidence, that the resolution of the contradicting evidence, is a function of the State Supreme Court and the review of that judgment based on a question of fact, would not be within the cognizance of the Supreme Court of the United States. We recognized that if the decision rested on a substantial basis of fact, the decision would involve a non-federal ground. With full recognition of that principle, we earnestly invoke the protection of this court against the employment of a device intended to deny the appellants their constitutional rights. We invoke the aid of this court in the protection of a Federal right against its denial by an improper use of judicial power. We ask the protection of this court because the decision for review is based on a suggested conflict in the evidence when no one can reasonably say there is a conflict in the evidence so as to involve a question of disputed fact.

This Court has repeatedly held that it must of need accept the decision of a State Supreme Court on a question of fact, if there be any reasonable ground to support the conclusion of the State Court, and will not interfere with that decision. Equally, it has been held that where it is charged that there is no non-federal ground to support the

decision of a state court, that one claiming the protection of the United States Constitution will not be denied that protection because a state court arbitrarily and unreasonably seeks to denude this Court of its jurisdiction by placing its decision on a question of a fact when its decision rests upon absolutely no ground. If the decision below violates every principle of logic and legal thinking by arbitrarily refusing to recognize the only possible conclusion from the facts, then there is involved a principle which invites the judgment of this Court. This Court has repeatedly held that the employment of devices by state courts cannot be the means of making one bereft of constitutional protection. It has held, wherever it is claimed that there is no evidence whatsoever to support the conclusion of a state court, but all of the evidence makes it inevitable that a contrary conclusion must be accepted, that this Court will protect constitutional right by examining the record to see whether or not the decision rests upon a substantial non-federal ground, or whether it has been placed upon such ground lacking in foundation so as to avoid a review by this court. The citation of cases hereafter makes acceptance of this contention ready and undeniable.

We assert boldly and without fear of being contradicted by the facts of the record, that the Supreme Court of Louisiana was compelled by law and logic to accept the inescapable conclusion that these futures contracts were instrumentalities of interstate commerce. We say boldly and without fear of contradiction that there is not a single word of evidence in this record by any witness to show that these contracts are not instrumentalities of inter-

state commerce. We say unqualifiedly and without the possibility of successful contradiction that Dr. Alonzo B. Cox, the leading expert on cotton marketing, not only in the United States, but throughout the world, has testified unequivocally that interstate commerce in cotton cannot be carried on efficiently, effectively and commercially without these futures contracts. Dr. Cox is Professor of Marketing at the University of Texas and is the chief consultant of the United States Department of Agriculture on the question of marketing. He has attended, on behalf of the United States Government, conventions in various parts of the world, held for the discussion of interstate and foreign commerce in cotton. He has written innumerable books and pamphlets, many of which have been circulated by the United States Department of Agriculture. His biography in "Who's Who in America" is necessarily long to record his many accomplishments. These accomplishments appear as a part of this record.

Professor G. Wright Hoffman, who is Professor of Marketing, Wharton School of Commerce of the University of Pennsylvania, and a consultant of the United States Department of Agriculture on interstate commerce in cotton, has testified with equal clarity and conviction that these futures contracts are not merely adjuncts of interstate commerce in cotton, but are an integral part of interstate commerce in cotton and without which such commerce could not be carried on according to present-day methods. His achievements are set forth in "Who's Who in America" and are bound to bring conviction that he speaks with authority and that his voice on the subject is most powerful.

Mr. J. M. Mehl is the present head of the Commodity Exchange Administration with headquarters in Washington. His Department supervises the operations of all commodity exchanges, including cotton exchanges throughout the whole United States. He administers the law of the United States which considers the operations of these exchanges to be of national importance and, consequently, subject to the regulatory power of Congress. Mr. Mehl testified without hesitation that these futures contracts are an essential part of interstate commerce in cotton and aid in the free flow of cotton from the farm to the ultimate consumer.

Mr. Walter Parker, an economist of note, who has been a delegate to several international conventions of cotton buyers and sellers, has testified, out of long years of experience in the cotton business and intensive study of its needs, that these futures contracts are the foundation of interstate commerce in cotton. His testimony is replete with convincing fact and argument that interstate commerce in cotton cannot be carried on without the execution of these futures contracts.

Mr. Robert E. Craig, long a member of the New Orleans Cotton Exchange, has testified from practical experience and intensive study that these futures contracts are an absolute need of interstate commerce in cotton.

There is in evidence a letter from former Secretary of Agriculture, Henry C. Wallace, to the same effect. There is a letter of Dr. J. T. W. Duvel, former head of the Commodity Exchange Administration, with like import. Both

of these letters were written to Committees of the United States Senate considering a tax by the Federal Government of futures contracts.

There is in evidence excerpts from debates in Congress, all tending to show that these contracts not only are an aid, but a necessity of interstate commerce in cotton. All of this was evidence introduced by the plaintiffs in the lower court and the appellants here. The only evidence offered by the Collector of Revenue was a stipulation which embodied the report of its investigator, J. H. Rester. His report of the operations of futures contracts is in harmony with the conclusions of the witnesses introduced by the plaintiffs in the lower court. No single word of the stipulation embodying the results of the investigation by Mr. Rester contradicts a single word, or impinges upon any conclusion of the witnesses for the plaintiffs in the lower court. The report merely shows that a great portion of the cotton bought and sold under these contracts is not actually delivered. If it be conceded, for the purpose of argument, that a great portion of the cotton is not delivered, that would in no wise destroy the contention that these contracts are needed instrumentalities of interstate commerce in cotton any more than to show that the fact that telephone and telegraph instruments do not move remove them from the category of instrumentalities of interstate commerce.

The plaintiffs have made two contentions. They contended that these contracts involve the buying and selling of cotton moving in interstate commerce and if they did not involve contracts for the buying and selling of cotton

moving in interstate commerce, nevertheless, they are instrumentalities of interstate commerce and so not subject to the imposition of state taxes. The Supreme Court of Louisiana conceded that even if they were not contracts covering cotton actually moving in interstate commerce the State of Louisiana is without power to tax instrumentalities of interstate commerce, and yet in defiance of every single word of evidence, held that they were not instrumentalities of interstate commerce. If there could be any escape from the inevitable conclusion of this evidence there might be some ground, however slight, upon which to rest the decision of the State Supreme Court on the ground of a non-federal question. We contend with all the earnestness and emphasis at our command that the declaration that the evidence did not show these contracts to be instrumentalities of interstate commerce was a device, either consciously or unconsciously employed to strip these plaintiffs of their consttuitional right.

If the right to appeal to this court were denied in this case, there would never be any case in which one might invoke the protection of the United States Constitution if a court were so minded by an unwarranted declaration on a question of fact to remove the litigants from that protection. If the court in this case should hold that the appellants are without right to invoke the protection of this court because of the unfounded declaration of the Supreme Court of Louisiana that the evidence is persuasive but not controlling, then Federal Constitutional rights would be dependent upon the will or whim of state courts who might, in defiance of law and logic, state a

conclusion absolutely contrary to the logical deduction from undisputed facts. If your Honors in this case should so hold, then the protection of constitutional right would be dependent, not upon the exercise of the jurisdiction of this court, but upon the willingness of a state court to accord to a litigant a right of appeal to this court for constitutional protection.

This Honorable Court has said otherwise. It has said that whenever it becomes necessary to investigate the facts of a record to ascertain whether an appeal properly lies to this court, that the Court will discharge that duty, mindful always that if the decision can be properly rested upon non-federal grounds, it will not exercise its appellate powers, but if the facts lead legally and logically to the conclusion that there is not sufficient support for the decision on non-federal grounds, that it will give to the litigant his right to be heard before this Honorable Court. The law as enunciated by this court is that the conclusion from facts might be so clear and so indisputable that it amounts to a conclusion of law, and if it be necessary to examine the facts to ascertain the legal conclusion from the facts the court will do so. The examination is not for the purpose of evaluating the evidence, but so that the court might know whether its jurisdiction has been properly invoked.

In the late case of *Demorest vs. City Bank Farmers' Trust Company, decided January 17, 1944, 319 U. S. ....*, it was said:

> "In thus rejecting appellants' version of its previous decisions the Court of Appeals disposed of their cases

on the ground that appellants have never possessed under New York law such a property right as they claim has been taken from them. If this is the case appellants have no question for us under the Due Process Clause. Decisions of this Court as to its province in such circumstances were summarized in Broad River Power Co. vs. South Carolina, 281 U. S. 537, 540, as follows: Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. But if there is no evasion of the constitutional issue, and the non-federal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court."

"See same case on rehearing, 282 U. S. 187, 75 L. Ed. 287, 51 S. Ct. 94, and Sauer vs. New York, 206 U. S. 536, 546, 51 L. Ed. 1176, 1181, 27 S. Ct. 686; Leathe vs. Thomas, 207 U. S. 93, 52 L. Ed. 118, 28 S. Ct. 30; Vandalia R. Co. vs. Indiana, 207 U. S. 359, 367, 52 L. Ed. 246, 248, 28 S. Ct. 130; Enterprise Irrig. Dist. vs. Farmers Mut. Canal Co. 243 U. S. 157, 164, 61 L. Ed. 644, 648, 37 S. Ct. 318; Ward vs. Love County, 253 U. S. 17, 22, 64 L. Ed. 751, 758, 40 S. Ct. 419; Fox River Paper Co. vs. Railroad Commission, 274 U. S. 651, 655, 71 L. Ed. 1279, 1283, 47 S. Ct. 669. Compare United Fuel Gas Co. vs. Railroad Commission, 278 U.

S. 300, 307, 73 L. Ed. 390, 395, 49 S. Ct. 150; Risty vs. Chicago, R. I. & P. R. Co. 270 U. S. 378, 387, 70 L. Ed. 641, 650, 46 S. Ct. 236."

Fox River Co. vs. R. R. Commission, 274 U. S. 651, 653:

"The right set up in the bill is one under the Federal Constitution. Whether the state court denied that right or failed to give it due recognition is a question upon which the plaintiffs are entitled to invoke the judgment of this Court. Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed, depends upon state law. *Cf. West Chicago, R. R. vs. Chicago*, 201 U. S. 506; *Ward vs. Love County*, 253 U. S. 17, 22, *Chicago, Burlington and Quincy Ry. v. Drainage Commissioners*, 200 U. S. 561; *Appleby vs. City of New York*, 271 U. S. 364, 380".

Ward vs. Love County, 253 U. S. 17, 25:

"The right to the exemption was a federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the Supreme Court is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support. *Union Pacific R. R. Co. vs. Public Service Commission*, 248 U. S. 67; *Leathe vs. Thomas*, 207 U. S. 93, 99; *Vandalia R. R. Co. vs. South Bend*, *ibid.* 359,

367; *Gaar, Scott & Co. vs. Shannon*, 223 U. S. 468; *Creswill vs. Knights of Pythias*, 225 U. S. 246, 261; *Enterprise Irrigation District vs. Farmers Mutual Canal Co.*, 243 U. S. 157, 164. And see *Jefferson Branch Bank vs. Skelly*, 1 Black, 436, 443; *Huntington vs. Attrill*, 146 U. S. 657, 683-684; *Boyd vs. Thayer*, 143 U. S. 135, 180; *Carter vs. Texas*, 177 U. S. 442, 447. Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. *Terre Haute & Indianapolis R. R. vs. Indiana*, 194 U. S. 579, 589. With this qualification, it is true that a judgment of a state court, which is put on independent non-federal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof".

Enterprise Irrigation District vs. Canal Company, 243 U. S. 157, 164:

"But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. See *Moran vs. Horsky*, 178 U. S. 205, 208; *Creswill vs. Knights of Pythias*, 225 U. S. 246, 261. And this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question. *Leathe vs. Thomas*, 207 U. S. 93, 99; *Vandalia R. R. Co. vs. South Bend*, *ibid.*, 359, 367. But, where the non-federal ground has fair support,

we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-federal questions".

Leathe vs. Thomas, 207 U. S. 93, 99:

> "Of course, there might be cases where, although the decision put forward other reasons, it would be apparent that a federal question was involved whether mentioned or not. It may be imagined, for the sake of argument, that it might appear that a state court even if, ostensibly deciding the Federal question in favor of the plaintiff in error, really must have been against him upon it, and was seeking to evade the jurisdiction of this court. If the ground of decision did not appear and that which did not involve a federal question was so palpably unfounded that it could not be presumed to have been entertained, it may be that this court would take jurisdiction. *Johnson vs. Risk*, 137 U. S. 300, 307."

We respectfully submit that under general principle and long established jurisprudence, the appellants should not be denied their right of appeal as it palpably appears that the ground of decision by the state court was not sufficiently broad to sustain its decision on non-federal grounds. The appellants are entitled to have this court review the facts. The review is not for the purpose of destroying the finding of facts by the state court, but to test the question of jurisdiction. We respectfully submit that if this record shows that the state court was bound by the undisputed evidence to accept the conclusion that these contracts are instrumentalities of interstate commerce, it could not avoid a recognition of the Federal con-

stitutional right by arbitrarily and wilfully saying that they may or may not be such instrumentalities of interstate commerce. There can be no difference in legal intendment between denying a principle of law and denying a principle which must be accepted from the facts. The test of constitutional protection is not a difference between destroying a legal principle and denying the inevitable legal conclusion from undisputed facts. The result to one seeking the protection of the United States Constitution is exactly the same and so the protection of this court against the employment of an unwarranted device by a state court is invoked with all sincerity and earnestness.

The appellants are entitled to the appeal. An examination of the record will so disclose and we respectfully ask that such examination be made to sustain the right of appeal.

Respectfully submitted,

ARTHUR A. MORENO,
Counsel for Appellants.

No. 710. KOHLMEYER, NEWBERGER & CO. ET AL. *v.* COOPER, COLLECTOR OF REVENUE. Appeal from the Supreme Court of Louisiana. March 13, 1944. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Ware & Leland* v. *Alabama*, 209 U. S. 405; *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 604; cf. *Minnesota* v. *Blasius*, 290 U. S. 1, 8; *Parker* v. *Brown*, 317 U. S. 341, 360–63. *Mr. Arthur A. Moreno* for appellants. Reported below: 16 So. 2d 247.